Filed 4/25/19 P. v. Shakoury CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALI REZA SHAKOURY, Defendant and Appellant.	H044440 (Santa Clara County Super. Ct. No. C1641244)

Ali Reza Shakoury appeals following his conviction of lewd acts with a child under the age of 14 (Pen. Code, § 288, subd. (a).)[1] He argues that there was insufficient evidence to support his conviction. He also argues that the trial court erred when it sentenced him to the aggravated term and when it failed to correct a factual error in the probation report. We affirm the judgment.

I. STATEMENT OF THE FACTS AND CASE

Shakoury is a limousine driver, and had worked for the victim's father, P. He had known P. and his family for about four years. P. considered Shakoury to be a good friend. Shakoury had a key to P.'s house, and had stayed overnight there on one occasion. Shakoury was like an uncle to P.'s six-year old daughter Q., and had a good relationship with her.

Shakoury attended an evening birthday party for P. at P.'s home. He arrived around 7:30 or 8:00 p.m. There were 11 or 12 adults and 7 or 8 children attending. P.'s

[1] All further statutory references are to the Penal Code.

wife L. asked all of the guests to go outside to sing "Happy Birthday." Q., who was five years old at time, was laughing and squealing in her bedroom. L. went into Q.'s bedroom and found Shakoury tickling her. L. told everyone to leave and to go outside. Q. jumped up and ran out of the bedroom. After the guests went outside, they all sat around a fire pit. Shakoury sat on a chair with Q. on his lap and her back against his chest. Q.'s brother was asleep on L.'s lap. It was dark outside. Q. got off of Shakoury's lap after sitting there for about 20 or 30 minutes. Q. came around the couch behind L. and said: "Mom, can I speak to you in private?" As Q. was saying this, "she sounded terrified." Q. had never asked L. to speak to her in private before.

L. immediately got up, and took her son and Q. inside the house. P. saw Shakoury "abruptly" get up and follow them inside. After L. took her sleeping son into the bedroom, she found Q. sitting on a giant stuffed bear in the living room, with Shakoury standing over her. L. could not tell if Shakoury was saying anything to Q., but Q. was looking up at him. L. approached Q., and took her away into the bedroom. Shakoury immediately went outside and told P. that he needed to leave the party to pick up a client.

Once L. took Q. into her bedroom, Q. told her that Shakoury touched her "woo-woo." Shakoury put his hands under Q.'s underpants and stuck his finger "in" her "front private" or "woo." Q. said that it hurt a "little bit" and that she felt "bad." Q. also told P. that "Ali reached into her underwear and touched her woo." When Q. felt Shakoury's finger touch her "woo", she tried to pull his hand out of her pants, but he put it back in her pants. L. saw that Q.'s vaginal area was "very red."

L. called the police and an officer came to their home at about 11:00 p.m. Q. was asleep in her bed. L. removed Q.'s clothing and gave it to the officer. A SART exam conducted the next day revealed male DNA on Q.'s genitals.

Shakoury was charged with sexual penetration of a child under the age of 10 (§ 288.7, subd. (b); count 1) and lewd acts with a child under the age of 14 (§ 288, subd. (a); counts 2 & 3). Shakoury was found guilty by a jury of one count of lewd acts

with a child under the age of 14 (§ 288, subd. (a); count 2). The jury found Shakoury not guilty of sexual penetration of a child under the age of 10 years (§ 288.7, subd. (b); count 1), and the prosecutor dismissed count 3 prior to trial.

At sentencing, the trial court imposed the aggravated term of eight years in state prison for the single count of lewd acts with a child under the age of 14 (§ 288, subd. (a), count 2). Shakoury filed a timely notice of appeal on February 22, 2017.

II. DISCUSSION

A. Sufficiency of Evidence to Support Conviction

Shakoury argues that there is insufficient support to sustain the requisite element of intent necessary to prove a violation of section 288, subdivision (a). We are not persuaded.

To resolve a claim involving the sufficiency of evidence, "a reviewing court must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) Each element of the offense must be supported by substantial evidence, i.e., evidence that reasonably inspires confidence and is of credible and solid value. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there is sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) This standard of review applies in cases such as this one where the prosecution relies on circumstantial evidence to prove certain elements of the charged offenses. (*Ibid.*)

Section 288, subdivision (a) criminalizes the commission of any lewd or lascivious act on a child under the age of 14 "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child. . . ." (§ 288, subd. (a).) "The statute is violated if there is ' "any touching" of an underage child accomplished

with the intent of arousing the sexual desires of either the perpetrator or the child.' [Citation.] Thus, the offense described by section 288(a) has two elements: ' "(a) the touching of an underage child's body (b) with a sexual intent." [Citation.]' " (*People v. Villagran* (2016) 5 Cal.App.5th 880, 890; see *People v. Martinez* (1995) 11 Cal.4th 434, 444, 451 (*Martinez*) [section 288 applies to any sexually motivated touching of a child under the specified age and can involve any part of a child's body].)

The defining characteristic of section 288 is " 'the defendant's intent to sexually exploit a child, not the nature of the offending act.' " (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1160.) Even if an act is innocuous and inoffensive to an outside observer, any touching of a child under the age of 14 constitutes a violation of the statute if it is accompanied by the intent to arouse or gratify the sexual desires of either the perpetrator or child. (*People v. Lopez* (1998) 19 Cal.4th 282, 289.)

Because intent can seldom be proved by direct evidence, it may be inferred from the circumstances. (See *Martinez*, *supra*, 11 Cal.4th at p. 445.) Circumstances which may be relevant to demonstrate the requisite intent to satisfy sexual desires include: the charged act itself, extrajudicial statements by the defendant, the relationship of the parties, other acts of lewd conduct by the defendant, coercion or deceit used to obtain the victim's cooperation, attempts by the defendant to avoid detection, offering of a reward to the child for cooperation, a stealthy approach to the victim, an admonishment by the defendant to the victim not to disclose the occurrence, physical evidence of the defendant's sexual arousal, and the occurrence of clandestine meetings between the defendant and child. (*Ibid.*)

Because section 288, subdivision (a) is violated by any touching of an underage child with the intent of arousing the sexual desires of either the perpetrator or the child, the circumstances of the touching are very relevant. (*Martinez*, *supra*, 11 Cal.4th at p. 452.) "The trier of fact must find a union of act and sexual intent . . . and such intent must be inferred from all the circumstances beyond a reasonable doubt. A

touching which might appear sexual in context because of the identity of the perpetrator, the nature of the touching, or the absence of an innocent explanation, is more likely to produce a finding that the act was indeed committed for a sexual purpose and constituted a violation of the statute." (*Ibid.*)

Shakoury asserts that because there is no evidence in the record that he committed other lewd conduct, no evidence of clandestine activity prior to the act of touching Q., and no evidence that he made extrajudicial statements that were incriminating, there is insufficient evidence that he touched Q. with any sexual intent. Shakoury directs us to consider the jury's deliberations and their question to the court about the charge to support his assertion. During deliberations, the jury was deadlocked 11-1 on the charge of committing lewd acts on a minor. They sent the following question to the court: "If a juror is unable to determine 'intent' based on [Q.'s] testimony alone, should that result in a not guilty verdict?" The court responded by referring the jury to the instructions that had been given previously, including the instruction that evidence includes testimony, exhibits and other items (CALCRIM No. 222), the instruction that facts can be proved by direct or circumstantial evidence (CALCRIM No. 223), and the instruction that intent can be proved by circumstantial evidence (CALCRIM No. 225). We infer from the jury's question that they agreed that the touching itself had occurred, and that Shakoury's intent was the only area of concern.

Consistent with *Martinez, supra*, the court correctly responded to the jury's question by referring to its previous instructions on circumstantial evidence, which informed the jury members that while they could rely on Q.'s description of what occurred, her testimony was not the sole evidence probative of Shakoury's intent. The jury could consider all of the circumstances surrounding the event and that Q.'s description of the actual act of touching was only one portion of the evidence presented at trial. For instance, Q. also testified that the touching caused pain, and her description was corroborated by evidence of vaginal redness, and of male DNA on her genitals. The jury

was entitled to conclude from this evidence that when Shakoury touched Q., the act was more than incidental or accidental hand to genital contact, but was purposeful, and thus consistent with a sexual intent.

Additionally, Shakoury's actions toward Q. before and after the touching were significant when considered with the touching itself, and were corroborated by L.'s observations. L. testified that before Shakoury touched Q.'s genitals, he touched Q.'s body by tickling her while they were alone in her bedroom, which could, in this context, be viewed as a prelude to subsequent sexual contact with the child. L. also testified that Shakoury held Q. on his lap during the party. It was reasonable for the jury to infer that Shakoury attempted to avoid detection by touching Q. while holding her on his lap in the dark while the adults were distracted by the birthday party. L.'s observation of Q.'s apparent fear when Q. asked to speak with her mother demonstrated that the child felt that something was amiss. When Shakoury immediately followed Q. into the house and stood over her while she sat on her stuffed bear, his action supported the reasonable inference that he was admonishing her not to report the incident, or reassuring her so that Q. would not construe it as sexual in nature. Additionally, the fact that Shakoury left the party immediately after Q. talked to L. about the incident, demonstrated his consciousness of guilt. These circumstances, which accompanied the actual act that occurred while Q. was on Shakoury's lap, could be interpreted by a reasonable jury to prove that Shakoury had the requisite intent to satisfy his sexual desires when he touched Q. We thus find that there is substantial evidence to support his conviction for violating section 288, subdivision (a). (See *Martinez, supra*, 11 Cal.4h at p. 445.)

B. Imposition of the Aggravated Term

We review a trial court's decision to impose a particular sentence for abuse of discretion. A trial court's sentence will not be disturbed on appeal "unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) "In reviewing for abuse of discretion, we are

guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.]" (*Id.* at pp. 376-377.) Even if a trial court has stated both proper and improper reasons for a sentence choice, "a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 492.)

Here, the trial court relied on two factors in ordering the aggravated term. The court noted Q.'s vulnerability (Cal. Rules of Court, rule 4.421(a)(3)), and the fact that Shakoury abused a position of trust (Cal. Rules of Court, rule 4.421(a)(11)). At the hearing, the court stated: "The position of trust and the vulnerability in this case are factors that the Court feels significantly outweigh any mitigators. The Court is going to concur with the People's request in this case for the aggravated term. I think that probation also, while they said midterm, made similar comments that they felt the conduct in this case, the result for Q. is significant and that the aggravated term is appropriate. . . . [¶] And just so it's clear what the Court's decision was, the Court does find that the factors in aggravation of the vulnerability of Q. in A-3 was [*sic*] particularly significant in this case and the advantage—taking advantage of the position of trust or confidence was particularly significant in this case. [¶] The Court has given some consideration to A-1, but the decision is based on A-3 and A-11, significantly outweighing the only factor in mitigation which is defendant's no—lack of prior record in this case. [¶] In this matter probation is denied. The defendant is committed to the

California Department of Corrections and Rehabilitation for a period of eight years. That is the aggravated term."

At the sentencing hearing, Shakoury objected to the court's imposition of the aggravated term, but failed to object to the reasons for the court's decision. The court's use of improper factors to impose the upper term is a discretionary choice that is waived if not brought to the sentencing court's attention. (*People v. Scott* (1994) 9 Cal.4th 331, 352-353.) Having failed to object below to the court's reasons for imposing the upper term, defendant cannot do so for the first time on appeal.[2]

However, even considering this issue on the merits, we reject Shakoury's claim. Shakoury argues that the trial court's decision was improper because it considered Q.'s age when concluding that she was particularly vulnerable, and age cannot be an aggravating factor because it is also an element of the offense. We agree that "[a] circumstance which is an element of the substantive offense cannot be used as a factor in aggravation. [Citation.]" (*People v. Clark* (1992) 12 Cal.App.4th 663, 666.) Thus, "aggravating a sentence due to 'particular vulnerability,' where vulnerability is based *solely* on age, is improper when age is an element of the offense. [Citations.]" (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693-1694 (*Dancer*); overruled on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.) However, "a victim's extremely young age together with other circumstances like the time and location of the offense can establish 'particular vulnerability' as an aggravating factor." (*Dancer,* at p. 1694.) " '[P]articular vulnerability' is determined in light of the 'total milieu in which the commission of the crime occurred. . . .' [Citation.]" (*Ibid.*) "Vulnerability" means defenseless, unguarded, unprotected, accessible, assailable, or

[2] Shakoury argues that in the event we find waiver of the sentencing error claim, he was denied effective assistance of counsel. Because we consider the issue on the merits, and find that there was no abuse of discretion by the trial court, we do not consider Shakoury's claim of ineffective assistance of counsel.

susceptible to a defendant's criminal act. (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.)

Here, we conclude that Q.'s age was not the sole factor that made her particularly vulnerable. Q.'s size in comparison to Shakoury's physical stature as an adult man made her extremely vulnerable to the molestation. There was no way for her to physically defend herself, or to successfully stop Shakoury. This was clearly evidenced by the fact that Q. tried to take Shakoury's hand out of her pants, but he put his hand back where she did not want it. Q. was more easily assailable because her size allowed her to fit on Shakoury's lap. She was also vulnerable because the criminal activity occurred in her own home, where she had no reason to suspect anyone would harm her, and occurred during a party, an event that any child would normally associate with fun pleasure, and not as a potential location for an unwanted assault. She was thus unguarded both emotionally and physically. When considering the " 'total milieu in which the commission of the crime occurred. . . .' " we agree with the trial court that Q. was particularly vulnerable. (*Dancer, supra,* 45 Cal.App.4th at p. 1694.) This factor was a proper consideration in ordering the aggravated term. (Cal. Rules of Court, rule 4.421(a)(3).)

Shakoury also argues that to the extent the court considered Q. particularly vulnerable because of her relationship with Shakoury, it erred. He asserts that, in effect, the use of Shakoury's relationship with Q. is no more than a restatement of the aggravating factor that Shakoury abused his position of trust. (Cal. Rules of Court, rule 4.421(a)(11).) We disagree. Use of the aggravating factor that an individual has abused a position of trust is based on the special status the defendant may have with the victim that serves to facilitate the abuse. (*Dancer, supra,* 45 Cal.App.4th at p. 1694.) Shakoury had a special status as a friend of the family and used his position of trust to enter the home and gain access to Q. through an invitation to a birthday party. Shakoury's relationship with Q. was like an uncle, and Shakoury used this in order to

make her sit on his lap so he could molest her. The court properly considered Shakoury's relationship with Q. because it facilitated his molestation of her, and thus constituted an aggravating factor. (Cal. Rules of Court, rule 4.421(a)(11).)

We find that the trial court did not abuse its discretion by using Q.'s particular vulnerability and Shakoury's position of trust as aggravating factors in determining Shakoury's sentence in this case. Q. was particularly vulnerable because of her size in relation to Shakoury and her defenselessness. In addition, Shakoury took advantage of his relationship with the family and abused his position of trust to gain access to Q. and molest her. The court's use of both factors was proper in this case.

C. Correction of the Probation Report

Shakoury argues that the court erred in failing to grant his attorney's request at the sentencing hearing that the probation report be corrected to accurately reflect his conviction. The facts stated in the report are as follows: "In the present offense, the defendant sexually assaulted the 5-year-old Q. by placing his fingers in her vagina while she sat on his lap at a family gathering," are inaccurate, because he was acquitted of count 1 that alleged digital penetration.

At the sentencing hearing, defense counsel stated: "On page 6 of the probation report in the second paragraph the probation officer states that he placed his fingers in her vagina, and I am asking for that portion to be stricken because of the acquittal on Count 1, deeming there was no penetration." The court proceeded to sentence Shakoury, and did not respond to counsel's request.

Shakoury argues that the court's failure to correct the probation report prejudices him because "the California Department of Corrections and Rehabilitation (CDCR) relies on probation reports when making discretionary decisions about a prisoner's housing, work, and prison privileges. (Pen. Code, § 1203.01; Cal. Code Regs., tit. 15, §§ 3075.1(a)(3), 3173.1, 3359.2 (d)(11); 3375 (j)(3).)" He also notes that the Board of Parole Hearings uses probation reports to determine if an inmate should be granted

parole. Shakoury argues that the statement that he put his fingers into Q.'s "vagina is not only inaccurate, it ignites the kind of inflammatory prejudice that could adversely affect [his] conditions of confinement."

We agree that trial counsel properly objected to the paragraph in the probation report, and that it was inaccurate. Although the abstract of judgment reflects the actual charge on which Shakoury was convicted, he is correct that both the CDCR and the Board of Parole Hearings look at the extrinsic evidence that accompanies the abstract when considering a variety of decisions related to conditions of confinement as well as conditions and timing of release on parole. As a result, the trial court should have stricken that portion of paragraph two on page six of the probation report that indicates that Shakoury digitally penetrated the victim.

Additionally, in our review of the record, we found an error in the abstract of judgment that requires correction. It accurately states that Shakoury was convicted of a violation of section 288, subdivision (a). However, the description of the crime states: "Oral copulation/penetration child < 10," which is not a violation of section 288, subdivision (a). The description of the crime should read:
"Lewd/Lascivious act on child < 14" to correctly reflect Shakoury's conviction.

III. DISPOSITION

The superior court is directed to correct the abstract of judgment as follows: "Oral copulation/penetration child < 10," is to be replaced with: "Lewd/Lascivious act on child < 14." The court is further directed to strike that portion of paragraph two on page six of the probation report. A certified copy of the corrected abstract of judgment and a corrected probation report shall be forwarded to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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Greenwood, P.J.

WE CONCUR:

_____
Elia, J.

_____
Grover, J.

People v. Shakoury
No. H044440